Building a Safer Future
Response to Consultation

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Summary

This document provides responses and commentary to selected issues within the MHCLG's consultation document *Building a Safer Future, Proposals for reform of the building safety regulatory system* – published June 2019.

We are broadly in agreement with the findings of the Hackitt review. We are supportive of the government's attempt to induce a culture change in the practices of the industry.

In relation to the consultation, we have some general comments which we have made in response to specific questions. These are summarised as follows:

1) The current functional requirements are not outcomes, and they do not naturally lead to a culture of *so far as is reasonably practicable*. We recommend that, if the government wish to induce a cultural change of this nature, the language of the functional requirements (or perhaps the Secretary of State's view) should be updated to ensure that adequacy is defined in terms of *so far as is reasonably practicable*. However, we do not believe a *so far as is reasonably practicable* approach is necessarily desirable for building regulation because it would logically lead to social inequality in safety outcomes.
2) The proposed dutyholder system may lead to the 'disappearance' of liability in cases where competent people are appointed to undertake tasks. We recommend that competent people should become co-signatories at each Gateway point.
3) While Approved Inspectors are retained within the system, we are concerned that the government are at risk of creating a Building Safety Regulator that *sounds* like a single regulatory body, but in reality, may simply represent a re-brand of the existing alternative regulatory routes.
4) We believe that the measures described regarding competence are largely symbolic and that the suggested approach is useful only in-so-far-as the legislative structure allows named individuals to be held to account under the law.

Overall it is our view that much of the detail presented in the consultation is likely to turn out to be irrelevant unless legislation allows named individuals across the breadth and depth of the construction sector to be held to account and meaningfully sanctioned for their actions (or inactions).

Format of this Document

Some of the questions in the consultation have relatively simple *yes* or *no* answers; many of the questions raise multiple complex issues in terms of the interaction of the regulatory system with technical and societal issues.

We have largely avoided addressing the questions where we believe there are relatively simple *yes* or *no* answers. Instead we have focussed on questions where the nature of our response requires a discussion of background and context to each of the key issues.

In addition, it is worth noting that we have limited our commentary to those areas where we feel that we have insight gained from our combined academic research, educational activities, and first-hand professional experience.

Some of the questions are in areas that, while we may have opinions, we believe that our knowledge is insufficient to make a formal submission of evidence. Similarly, there are areas where we feel that other voices in the sector have a significantly stronger claim to authoritative knowledge. In these areas, we have refrained from making any comment.

About the respondents

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Supporting Research

Appended to this response to consultation, we have also included three research papers that we believe are centrally relevant to addressing the various issues associated with the Building Safety Programme's current activities. We provide these in the hope that they can give some insight about the theoretical underpinnings that have informed our response to the key issues.

These are as follows:

- *Beyond the Stable Door: Hackitt and the Future of Fire Safety Regulation in the UK*. This paper provides an analysis of the Hackitt review and forms the basis for much of our response herein. This text has been accepted for publication in the journal *Fire Safety Journal*.
- *Post Construction Fire Safety Regulation in England: Shutting the Door Before the Horse has Bolted.* This work was conducted prior the Hackitt review and provides an analysis of post construction fire safety regulation. It was published in the journal *Policy and Practice in Health and Safety* in April 2019.
- *A Credibility Problem: Test Results in Fire Engineering.* This work analyses the use of tests (and specifically large-scale cladding tests) in fire safety engineering. This paper will be presented at the Australia Fire and Emergency Services Advisory Committee Conference 2019.

Academic Freedom

The authors are responding as individuals and exercising our academic freedom in accordance with Higher Education Governance (Scotland) Act 2016.

Chapter 2

Q 1.2 How can we provide clarity in the regulatory framework to ensure fire safety risks are managed holistically in multi-occupied residential buildings?

It is not self-evident that the current functional requirements satisfy Hackitt's recommendation that an outcomes-based system should define the 'outcome or performance level to be achieved' or that 'the new regulatory framework should require industry and regulators to agree solutions which reduce risk "so far as is reasonably practicable"'.

For example, in relation to B4 (that the external walls of the building shall adequately resist the spread of fire) there is no specific outcome expressed other than *adequacy*. The adequacy (or otherwise) of measures to resist spread of the fire on the external walls of the building can be judged only in the context of the overall fire strategy of the building. Taken alone, B4 (or any of the other functional requirements) does not, therefore, define an outcome.

To provide clarity in the regulatory framework that is consistent with Hackitt's desire for an outcomes-based system and that encourages a culture of *so far as is reasonably practicable*, the functional requirements may need to be re-framed in the language of *so far as is reasonably practicable*. For example, an outcome in relation to B4 might be expressed as:

The external walls of the building shall, so far as is reasonably practicable, resist the spread of fire over the walls and from one building to another.

An alternative approach would be to reformulate the functional requirements around the health and safety outcomes for affected individuals. For example, in relation to occupants:

So far as is reasonably practicable, no occupant should be affected by the fire, smoke or the structural failure of any component of the building.

A further alternative would be for the Secretary of State's view (in updated guidance) to be that adequacy is achieved only when risk is reduced *so far is as reasonably practicable*.

In making any changes it is also worth noting that the principle of so far as is reasonably practicable introduces the potential for inequality of safety outcomes[1] across the built environment. It would presumably be an unintended consequence of this cultural change that those with fewer financial resources obtain lower levels of building safety – because this legislative approach would in principle require those with greater financial resources to spend more on safety.

Answer: If the government is actually seeking a culture of *so far as is reasonably practicable* with respect to building and fire safety, then this language should be embedded within the legislative requirements.

[1] We owe this insight to a conversation with Neal Butterworth.

Chapter 3

Q 2.4 Do you agree with the approach outlined above, that we should use Construction (Design and Management) Regulations 2015 (CDM) as a model for developing dutyholder responsibilities under building regulations? Please support your view.

We are supportive of named people taking responsibility and being accountable.

However, while this proposal is presented as analogous to CDM, there are also strong parallels with the regulatory approach of the Regulatory Reform (Fire Safety) Order 2005. The RRO has been demonstrably ineffective in adequately regulating the risks and (as noted in the consultation) is now subject to its own consultation.

We have analysed the proposed system, and believe that there is a potential omission that will allow all parties to avoid being held accountable for activities that do not achieve the required standard.

Firstly (for example) consider a dutyholder who recognises that they need to appoint a competent fire engineer. They would:

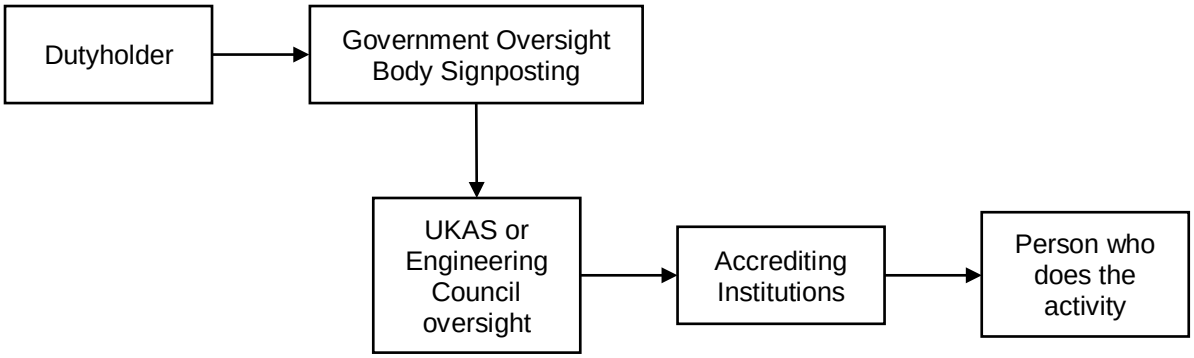
1) recognise that they need to appoint a competent person;
2) find a fire engineer, and then check that:
    a. the engineer has been accredited by an institution; and
    b. the institution is (either directly or indirectly) on the Government Oversight Body (GOB) signposting list.

The route by which the dutyholder would assure themselves that the individual has adequate competence is illustrated in Figure 1. If this approach were to be taken, then a dutyholder would likely argue that they had discharged their duties in accordance with Paragraph 62.d. of the consultation document.

However, if the fire engineer's activity was not of the appropriate standard (or resulted in a building that did not achieve the required outcome), the proposed system does not explicitly allow legal accountability for responsibility for this error to be passed down to the fire engineer. The dutyholder would simply blame the GOB for inappropriate signposting; the GOB could blame Engineering Council for accrediting the Institution of Fire Engineers (IFE); Engineering Council would blame IFE for accrediting such an individual; and IFE would then have to determine whether disciplinary action could be taken.

Therefore, while the fire engineer's inappropriate activity might not be without consequence (e.g. they could lose their accreditation), they could not be found guilty using any of the legal sanctions that are proposed with respect to the duty holder. The accountability and liability that has been created by the new regulatory framework has thus 'disappeared' – nobody would be held to account, as the liability would vanish into a multitude of committees and professional bodies.

Route to appoint a competent person:



Route to shift liability if activity is not appropriate:

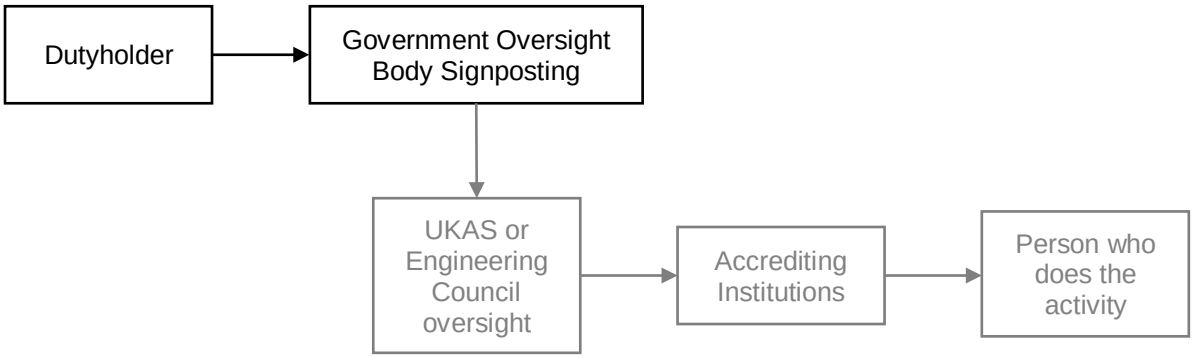


Figure 1 Routes of appointment, and termination of liability with GOB.

One solution to this could be to ensure that individuals who have taken responsibility for certain aspects of the design or construction are specifically named in the Gateway Documentation. For example, it is proposed on Page 143 of the consultation that Principal Designers should '*Co-sign a declaration of compliance confirming that, to the best of their knowledge the building complies with building regulations and that an appropriate handover of information to the occupation dutyholder has taken place*'. Similar text could be developed for designers and contractors.

In cases where the dutyholder had discharged their duties to appoint an apparently competent person (by using the GOB list), this would allow designers and contractors to be held accountable under the legislation for activities that did not meet the requirements.

Answer to Q2.4: Designers and contractors should be required to co-sign – as named professionals – at gateway points to ensure that accountability cannot disappear by simply appointing somebody who is notionally competent.

Q 4.7 Are there any specific aspects of handover of digital building information that are currently unclear and that could be facilitated by clearer guidance? If yes, please provide details on the additional information you think should be clearer.

Experience with Regulation 38 shows that even when handover of design information has occurred, this is usually not readily available to the current 'responsible person' and is rarely used to inform fire risk assessments. In the past this typically meant physical files being locked away with no one knowing of their existence, but making information digital is no guarantee that the information will not similarly be mislaid in future, especially when IT systems are changed, perhaps due to new ownership. To ensure that the 'golden thread' information is always available, and also to act as check on compliance, we recommend that this information should also be lodged with the Building Safety Regulator (and kept up to date as appropriate).

Q 4.13 Do you agree that mandatory occurrence reporting should be based on the categories of fire and structural safety concern reports identified in the prescriptive list in paragraph 222? Please support your view.

We are supportive of mandatory occurrence reporting on the basis that we believe this would drive an improvement in the culture within the industry. If people believe that occurrences will be reported and that they may be held to account for these, we expect that this will provide some incentive to undertake their activities in a more appropriate, ethical, and professional manner.

We are supportive of the proposal to expand the scope and expertise of the CROSS; however, it is our view that the mandatory occurrence reporting should be directly to the Building Safety Regulator as proposed in the consultation document. It is our view that this would be indicative of the serious nature of the mandatory reporting, and allow CROSS to focus on the wider fire safety issues that have voluntarily been reported (noting that this does not exclude mandatory occurrences also being voluntarily reported to, and then potentially escalated by, CROSS).

Chapter 5

Q 6.2-7.4 Building Safety Regulator, Conflicts within the System, and Competence

We are supportive of the proposal to establish a Building Safety Regulator. However, we have significant concerns with respect to the practicality of this proposal. It is possible that some of these concerns could be mitigated, but only if they are identified a-priori and acted upon.

Our concerns relate to the degree to which any Building Safety Regulator would be free from conflicts of interest; the degree to which oversight of competence by the Building Safety Regulator would result in meaningful change; and the long term political will to sustain such an organisation (and retain competent people within it).

Conflicts of Interest

It is our observation that despite significant evidence of a conflict of interest created by the existence of Approved Inspectors, the Hackitt review and the consultation are suggesting that Approved Inspectors should be retained – with the only reasons for this being vague statements about ‘capacity’ and ‘expertise’.

It is our observation that this may be the product of a conflict of interest with regard to the Construction Industry Council’s (CIC’s) role in the Industry Response Group (IRG). The CIC’s involvement with CICAIR leads to apparent conflict of interest concerning the role of Approved Inspectors within any future regulatory system.

For outsiders, it is impossible to know whether and how the CIC’s conflict of interest has influenced the IRG’s advice to government and the resulting proposed policy response. However, it is our view that the widely perceived apparent conflict of interest is damaging to the credibility of (and ultimately public confidence in) the reformed regulatory system.

We are concerned that while Approved Inspectors are retained within the system there will, in practice, always be a choice of regulator. We are concerned, therefore, that the proposed Building Safety Regulator *sounds* like a single regulatory body, but in reality, may simply represent a re-branding of the existing alternative regulatory routes.

Competence

Any progress with regard to improving competence within the industry is to be welcomed. With respect to conflicts of interest within the future regulator, the Competency Steering Group provides a useful case study of how this may work in practice.

The manner in which the leadership of the competency working groups has been assigned means that the organisations who were notionally responsible for delivering adequate competence in the pre-Grenfell environment have now formulated a plan to address lack of competence in the post-Grenfell environment. This raises the obvious – and ironic – question of whether these organisations are willing, or indeed competent, to address the issues that have been diagnosed by Hackitt and described within the consultation.

Similarly, it cannot go unremarked that the committee chaired by the Director of Standards for British Standards recommended that the solution to the issue of competence is… a new British Standard. Irrespective of the rights or wrongs of this proposal, the appearance of conflict is remarkable.

The leadership of many of the organisations involved in the process appears to recognise the need for culture change with regard to competence. However, it is our observation from our interactions with the fire safety community[2] that, even in the post-Grenfell environment, there is a *business as usual* approach to the culture of competence. This was most strikingly put to us by one regulator recently as: 'Culture change? What fucking culture change?'.

Setting up an industry committee and establishing standards for competence may lead to improvements (from a low base) but there is no reason to expect that this will change the existing 'compliance culture' and bring about the shift towards the safety culture sought by Hackitt. It is wishful thinking to expect an industry with a history of cutting corners to change its culture as a whole; what is sorely needed is clearer individual responsibilities, backed up by effective sanctions.

It is our view that competence will only be addressed via a two-step approach whereby (1) each necessary profession is protected under legislation; and (2) there is a legislative mandate is to use such professionals in the appropriate parts of the process. Whilst many interested voices across the industry have claimed that UK competition regulations might preclude such an approach, we view this as essentially analogous to Section 4 of *The Reservoirs Act 1975*.

This approach is hinted at within the CSG's proposal for a Government Oversight Body signposting list. However, the proposed approach lacks a legislative mandate. Without clear legal responsibility for named professionals throughout the system, it is our view that it will be no easier to hold individuals to account than it is in the current framework, and little or no change will occur. Without such a mandate the accredited professional would no doubt find themselves a victim of the pre-existing 'race to the bottom' described by Hackitt.

Concerning Q7.1, and the proposal to create an overarching competence framework formalised as part of a suite of British Standards and Publicly Available Specifications, we are of the view that this proposal is largely symbolic. It is symbolic in that it demonstrates that industry believe the need to do *something*, but our view is that this approach is useful only in-so-far-as it *could* – if properly implemented via legislation and protected titles – allow named individuals to be held to account under the law.

Political Will

Our final concern regarding the Building Safety Regulator relates to the long term political will (and resources) to sustain such an organisation. The rapid growth of the Building Safety Programme serves as evidence of the magnitude of investment required simply to analyse an appropriate policy response to Grenfell – let alone establish a regulator capable of delivering the various activities in Paragraph 3.15. One of the key issues with fire safety is

[2] See also CROSS report 798 https://www.structural-safety.org/media/676688/cross-newsletter-55.pdf

that poor design and practice are only occasionally exposed, and rarely with such disastrous consequences as to have significant political ramifications. The often long gaps between disasters are thus likely to lead governments to question whether fire safety continues to need such funding.

This leads to the conclusion that there is likely to be continuing 'expertise asymmetry' between those competent in building design and those charged with regulation of design. For example, fire safety engineers are increasingly making use of complex and opaque computational modelling, whose outputs are heavily dependent on user choices and competence, but which can only be interrogated by regulators who understand these models *and* the underlying science on which they are based. Without a substantial allocation of government funding it is unlikely to be possible for the Building Safety Regulator to develop and maintain the capacity to provide detailed oversight of outcomes-based fire safety design solutions.

The alternative to detailed oversight of design approval is that the regulatory system focusses more on checking *who* does this design work and less on *what* they do. As Hackitt concludes: 'An outcomes-based framework requires people who are part of the system to be competent, to think for themselves rather than blindly following guidance, and to understand their responsibilities to deliver and maintain safety and integrity throughout the life cycle of a building'. This requirement (as discussed above) appears to have been addressed by 'brigading' it into the functions of the proposed Building Safety Regulator in the form of establishing a committee to oversee competence. However, the proposed committee is comprised of industry bodies that may have a conflict with respect to the regulation of their own activities.

Regarding Q6.2, if the government is committed to supporting a Building Safety Regulator in the long term, then it must investigate how to create and retain a core group of competent individuals who are independent from the industry they are charged with regulating.

Chapter 6

Q9.X Sanctions

We are broadly in agreement with the proposed regimen of enforcement and sanctions. However, as described above, it is important that to avoid liability 'disappearing' designers and contractors should also be included within the remit of the sanctions.

While the sanctions outlined in Chapter 6 appear appropriate, we observe that other parts of the document appear to water down the absolute nature of some of the sanctions. For example, Chapter 6 states that 'Carrying out work without having acquired the necessary permission by the building safety regulator to proceed through the gateway regime could lead to criminal offences'. This is reinforced by Paragraph 92 which identifies that Gateway 2 will be a 'hard stop' before the regulator gives permission for construction to begin.

However, paragraphs 94 and 95 appear to mitigate this by identifying that 'waiting for information may delay developments from progressing' and therefore proposes a 'hard stop' in stages (i.e. foundation superstructure). We would argue that the detail of this section appears to undermine the stated intent of the process.

Furthermore, the proposed sanctions in relation to Q2.17-2.20 do not align well with a regulatory regime that is focused on improving competence. In order to drive a culture of change within the industry, we would argue that sanctions should be focused on individuals rather than projects. For example, if 'work is carried out without approval' then in addition to 'pulling down' the work, this should have a significant negative impact also on the relevant dutyholder *and* the person who undertook the work.

We would argue that since dutyholders are to be licensed under the proposed new UKAS/BSI scheme, such activities should automatically result in the temporary or permanent revocation of licence to practice, along with public disclosure of any sanctions set out, as is common in some other jurisdictions internationally.